United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be Argued by
BARBARA ANN SHORE

75-2076

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B/S

UNITED STATES ex rel. JOHN J. PELLA,

Petitioner-Appellant,

-against-

HON. THEODORE REID, Superintendent of
Albion Correctional Facility,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant appeals from an order dated April 11, 1975, of the United States District Court for the Northern District of New York, Foley, J., denying petitioner-appellant's application for a writ of habeas corpus. On May 12, 1975 the court below granted a certificate of probable cause.

Questions Presented

1. Was there a lawful arrest?

2. Assuming arguendo that the arrest was unlawful, were later, independent in-court identifications admissible?

3. Were in-court identifications independent of any pre-trial confrontation?

Statement of Facts

Petitioner-appellant ("petitioner") is incarcerated in Albion Correctional Facility as the result of a conviction in Oneida County Court, Walsh, J. after trial by jury of the crimes of first degree robbery and second degree burglary. Petitioner was sentenced to concurrent twenty-five and fifteen year terms. The Appellate Division, Fourth Department affirmed the conviction (39 A D 2d 840 [1972]), without opinion and the New York Court of Appeals denied leave to appeal in July, 1972.

A. The Crime.

The events of the crime, petitioner's, and apprehension by the police were developed during the trial. The pages of the trial minutes, an exhibit in the court below, shall be hereafter described as "R-".

The Cingarelli house was located on Cedar Street, Rome, New York, in a sparsely populated area where new housing was being constructed.* Mr. Cingarelli was at work while Mrs. Cingarelli was doing errands on the morning of April 19, 1968.

At approximately 8:00 a.m. on that morning, four men in a yellow Chevy Impala with a black vinyl top parked at Rome Hospital [R-273]. Two men got out of the car, walked up to Cedar Street and looked around, before returning to the hospital. They were later identified as Centolella and Pella [R-412].

At approximately 11:30 a.m. three men walked back to the Cingarelli house, two in white construction uniforms and one in a green sport jacket [R-415, R-148]. They went into the garage; and then into the house.

Mrs. Cingarelli returned from a hair appointment and went thru the garage and thru the kitchen entrance of the house. She noted marks around the jamb of the door [Cingarelli R-168-172], but entered the house, only to face the robbers inside. Subsequently, she was threatened by guns, grabbed by the neck and forced to the floor by two men [R-176-7]. She was tied with the cord from venetian blinds and dish towels were stuffed in her mouth [R-179]. They took four dollar bills from her pocketbook.

* A map of the area is appended to this brief. Most of the area was still empty lots [R-366].

She screamed [R-179]. The men went out the back door, as workmen from the surrounding construction sites ran to help [R-183, R-360, R-628].

The three men ran away thru the back door, toward James Street. They threw away their uniforms and gun while running [R-356, 358]. The three men were seen by Thomas Rees and later identified by him as Rinaldi, Pella and Centolella [R-1161]. The men got into the Chevrolet now parked on Chestnut Street, north of Cedar Street and turned into Mohawk Acre Shopping Center followed by other men who had heard the shouting [R-543, 545]. The car stopped, the men got out. Two men started running and two walked. The two men running were followed and apprehended and were identified as Rinaldi and Centolella [R-636]. Four one-dollar bills were found in Centolella's pocket [R-1403].

B. The Arrest of Pella.

Shortly thereafter, about 11:45 a.m., Alfred Schiano, a produce businessman in Syracuse, and friend of Centolella and Rinaldi [R-1550] received a telephone call to pick up two men, Netro and Pella, at the Holiday Inn on Erie Blvd., Rome, New York [R-1553]. He picked them up in his 1968 Cadillac to drive them to Syracuse [R-1556].

Trooper Risley recognized the Cadillac and from that recognition felt that it was connected to the Robbery in Rome [R-1464-1477] and telephoned the message in [R-1430, 1472].

At 1:45 p.m. Trooper Dillon received the message to stop the Cadillac [R-1449, 1509, 1518] and arrested the occupants of the car at the Thompson Street exit [R-1557].

C. The Allegedly Tainted Identification Procedure.

Both witnesses and defendants were in the police station that day. The witnesses waited for six hours in the stationhouse before a lineup [R-493, 1169]. They were shown pictures but there was no identifications made from these pictures.

At the lineups, Pella, Centolella and Netro were represented by counsel, Mr. Brindisi [R-445]. The suspects were in the same lineup with four police officers. No identifications of Pella was made by the witnesses at this time.

The next day, Rees identified Pella from the picture of the lineup [R-1177]. Alder stated he saw a side view of Pella which aided his recollection of on-the-scene identification [Alder 511]. On April 22, 1968, Pella, Centolella and Rinaldi

were arraigned.

D. The State Court Trial.

Petitioner was indicted with Rinaldi, Netro and Centolella. Netro's case was severed and subsequently dismissed.

Petitioner's trial lasted 21 days. Rinaldi who had had a Wade hearing, prior to the trial, was severed from the trial for medical reasons [R-254-261].

Thomas Alder and Thomas B. Rees both positively identified Pella as one of the perpetrators [R-412, R-1161]. No trial testimony was adduced about Pella's lineup.

During the course of the trial, a Wade hearing was held to determine that Pella was indeed represented by counsel [R-366-344]. There was a hearing to determine there was probable cause for the arrest [R-1464-1522]. There were also separate voir dire hearings to suppress evidence, which motions to suppress were denied. Pella's only witness sought to contradict. Rees' identification, by means of testifying to a conversation with Rees.

Prior Proceedings

A. State

Petitioner's identification claim was exhausted on appeal to the Appellate Division, 39 A D 2d 840 (1972) and the denial by the State Court of Appeals of leave to appeal.

B. Federal

On October 7, 1974, an application for a writ of habeas corpus was filed in the United States District Court for the Northern District of New York, (Foley, J.). Petitioner again raised his identification claim.* After hearing oral argument, going over the trial minutes, and reading the briefs, the District Court in a detailed, reasoned decision, concluded the application should be dismissed. The court held petitioner received a fair trial and one which complied with all federal constitutional requirements, on April 11, 1975. (Memorandum, p. 12).

Judge Foley's opinion will be used in the body of this brief.

* Petitioner also claimed he was denied the right to cross-examine Mrs. Cingarelli. Judge Foley dismissed that claim, and that ruling is not being appealed. Therefore, that part of the decision should be affirmed. Benenson v. U.S., 385 F. 2d 26, 29 (2d Cir., 1967) FRAP 3(c), 28.

POINT I

THERE IS ENOUGH TESTIMONY IN THE RECORD TO INDICATE PROBABLE CAUSE FOR ARREST.

The state trial took place in 1969 prior to the United States Supreme Court case of Whiteley v. Warden, 401 U.S. 560 (1971). Therefore, events surrounding the arrest are not as well-developed as they should have been and the court below was constrained to hold the arrest lacked probable cause. However, we respectfully submit that there is enough on the record to indicate there was probable cause to arrest Pella.

Under New York Code of Criminal Procedure § 177, in force in 1968,

> "a peace officer may, without a warrant, arrest a person, ...
> 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

The Rome police were notified of the Cingarelli robbery, and by 12:00 noon, Centolella and Rinaldi were apprehended. There was certainly enough time for an all-points bulletin to reach Investigator Risley.

As we understand the record, Trooper Risley on the

Thruway patrol noticed the Red Cadillac, knew the car and its license plate and associated it with the reported robbery [R-1464-77]. The return of Assistant District Attorney Daniel Wilson, sworn to February 10, 1975, further amplifies the Risley observations and its consequences.

More specifically, the return below indicates that:

1. Risley observed the vehicle entering the thruway from the direction of Rome, New York, within two hours of the robbery;

2. one of the occupants was noticed to be Alfred Schiano, brother of Albert Schiano, who was the owner of the Chevrolet used in the robbery and by this time the possession of the police;

3. the police then had information that two men were wanted in connection with the robbery. Risley first thought he saw two occupants, but since a third person would be necessary to pick up the others, the third man did not vitiate probable cause; and

4. The Schianos were associated with Rinaldi, and knew Centolella, defendants already apprehended, so a Schiano vehicle in the area of the robbery was suspicious.

In the considered opinion of Investigator Risley, a police officer, there was probable cause to believe that the occupants of the Cadillac were involved in the Cingarelli robbery.

Trooper Dillon who affected the arrest received a police radio message that the Cadillac was wanted in connection with the robbery and the occupants were possibly armed [R-1509, 1518-19]. It is not hard to infer that the Rome police were familiar with Rinaldi and his associates and that the Schiano car had been used in other robberies. [See return in court below of Assistant Attorney General Joseph Castellani.]

It would appear the collective knowledge of the police force would warrant probable cause. U.S. v. Caniesco, 470 F. 2d 1224 (2d Cir., 1972); U.S. v. Moore, 459 F. 2d 1360 (D.C. Cir., 1972); U.S. ex rel. Scott v. LaVallee, 379 F. Supp. 111 (S.D.N.Y.); U.S. ex rel. LaBelle v. LaVallee, Docket No. 75-2004 (2d Cir., May 30, 1975).

The case at bar may be distinguishable from Whiteley v. Warden, 401 U.S. 560 (1971). In that case, the bulletin was based on an informer's tip, rather than a reliable policeman using his observations and knowledge. Furthermore, in Whiteley the arrest took place over 24 hours after the burglary. In this case petitioner was arrested within two hours of the robbery, in a car that left Rome, New York, scene of the robbery.

POINT II

ASSUMING THE ARREST WAS ILLEGAL, IT DID NOT TAINT ALL IDENTIFICATIONS OF THE PETITIONER.

Petitioner claims the arrest was invalid, and therefore any identification evidence seized (ie. the petitioner) should have been excluded. He bases this premise primarily on Wong Sun v. U.S., 371 U.S. 471 (1963) and U.S. v. Edmons, 432 F. 2d 577 (2d Cir., 1970) stating the arrest tainted all further investigation of petitidner.

However, as Judge Foley noted, an illegal arrest without more, after the indictment and conviction of a defendant, is insufficient to sustain a writ of habeas corpus U.S. ex rel. Burgett v. Wilkens, 283 F. 2d 306 (2d Cir., 1960) (per curiam) cert. den. 393 U.S. 1050 (1969). Cf. Frisbie v. Collins, 342 U.S. 519 (1952).

Judge Foley noted nothing was introduced into evidence that resulted from the search and could conceivably be fruit of the poisonous tree, (neither out of court-identifications, nor any concrete evidence used to influence the identification). Cf. U.S. ex rel. Mungo v. LaVallee, Docket No. 75-2019 (2d Cir., July 15, 1975).

The fact a person is made available for identification is not automatically suppressible. Petitioner would have been identified through mug shots or routine police investigation of the other arrested men. "To grant lifelong immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to police that a man was not a law abiding citizen would stretch the exclusionary rule of evidence beyond tolerable bonds." U.S. v. Friedland, 441 F. 2d 855, 861 (2d Cir., 1971), cert. den. 404 U.S. 867.

Indeed, other circuits have specifically held that witness' identification of the suspect cannot be automatically suppressed because of an illegal arrest.

"An illegal arrest does not per se make inadmissible positive identification testimony that is otherwise competent." United States v. Young, 512 F. 2d 321, 323 (4th Cir., 1975). Whether the testimony is admissible depends on whether the confrontation is "so unnecessarily suggestive and conducive to irreparable mistaken identification that (the accused is) denied due process of law." Stovall v. Denno, 388 U.S. 293 (1967). United States v. Young, at 323. See also, LeBlanc v. U.S., 391 F. 2d 916, 917 (1st Cir., 1968). The court held in D'Argentino v. U.S., 353

F. 2d 327, 333 (9th Cir., 1965), cert. den. 383 U.S. 963:

> "An illegal arrest may prevent the use of evidence seized for that particular offense for which the arrest was made but the identity of the person, the description of his car and its license number are all matters that are observable to an alert intelligent officer.... All evidence offered was that of identification."

As petitioner admits, there is a difference between the case at bar and that of U.S. v. Edmons, 432 F. 2d 577 (2d Cir., 1970). First, Edmons involved a federal conviction, and there is nothing in the opinion to indicate that the court acted other than in a supervisory role over the federal court. Secondly, the arrest was definitely in good faith. In Edmons, the FBI arrested people on false pretenses for the purpose of bringing them to a lineup in another case.

The court stated:

> "The arrests here violated the Fourth Amendment not because law enforcement officers crossed the line, often a shadowy one, that separates probable cause from its lack, but because they deliberately seized the appellants on a mere pretext for the purpose of displaying them to agents who had been present at the scene of the crime." at 583.

Indeed, the court specifically stated:

> "We are not obliged here to hold that when an arrest in good faith turns out to have been illegal because of probable cause, an identification resulting from the consequence custody must inevitably be excluded." U.S. v. Edmons, at 584.

In this case, the arrest was in good faith and upon further examination, the in-court identifications were demonstrably not only independent of any prior identifications but also "sufficiently distinguished to be purged of the primary taint." Wong Sun v. U.S., 371 U.S. 471, 487-8 (1963), which will be more fully developed in Point III, infra.*

* See Michigan v. Tucker, 417 U.S. 433, 446 (1974). In holding that incriminating testimony of a witness, discovered through a pre-Miranda interrogation of the defendant was admissible, the court held:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

POINT III

THE IDENTIFICATION PROCECURES WERE NOT UNDULY SUGGESTIVE SO AS TO TAINT THE IN-COURT IDENTIFICATIONS.

A. The out-of-court Identifications were not unduly suggestive.

Petitioner also claims the in-court identifications were not trustworthy, due to the prior out-of-court procedures.

Judge Walsh held a Wade-type hearing during the course of the trial. He found that Pella was represented by counsel at the lineup and at arraignment [R-445]. He had previously found the lineup to be fundamentally fair [R-423, 448], and as Judge Foley noted, such findings were entitled to great weight on a habeas corpus petition. U.S. ex rel. Phipps v. Follette, 428 F. 2d 912, 915-916 (2d Cir., 1970), cert. den. 400 U.S. 908 (1970); U.S. ex rel. Bates v. Mancusi, 360 F. Supp. 1340 (W.D.N.Y., 1973), 28 U.S.C. § 2254(d).

The composition of the lineup did not cause mass identification of petitioner, who indeed had been wearing a construction uniform and overalls during part of the robbery. The confrontations were on the same day as the robbery, while the mental image of the perpetrators was certainly retained by the witnesses. The petitioner was not forced to wear a special costume. Under the

totality of the circumstances, the confrontation was not so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. Stovall v. Denno, 388 U.S. 293, 301 (1967). Neil v. Biggers, 409 U.S. 188 (1972).

It is also important that petitioner was represented by counsel at the lineup. Thus, the presence of counsel at the lineup, as Wade indicated, enabled petitioner's counsel, if he so chose, to use that lineup and attempt to invalidate the in-court identification by thorough cross-examination.

B. The in-court Identifications possessed independent basis and were independently derived.

As Judge Foley notes, assuming that the identifications were tainted by the arrest or by suggestive procedures, nonetheless, the in-court identifications had independent basis in fact and law.

The court quoted U.S. ex rel. Phipps v. Follette, 428 F. 2d 912, 915 (2d Cir., 1970), cert. den. 400 U.S. 908 (1970):

> "The effort must be to determine whether before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind, that he is able to rely on it at trial without much, if any

> assistance from its successor.... In making this subtle determination much will depend on the witness' initial opportunity for observation and also on whether he was motivated to make a careful observation of the perpetrator."

Judge Foley used the following criteria in evaluating the independence of those identifications:

1) Witness had good view of perpetrator and is unequivocal in identification.

2) Criminal's appearance made lasting impression.

3) Identification strong throughout proceedings.

4) Effective cross-examination.

5) Additional corroborative evidence.*

The weather on April 19, 1968 was clear [R-1292].

Thomas Rees, the primary witness, testified that as he was getting into his parked car, he noticed three men running from the area of Cedar Street. He observed them from a distance of 70 feet to 35 feet where they stopped on an embankment, and

* It should be noted that these criteria are valid for evaluating "totality of circumstances". The standards elicited in Neil v. Biggers, and cited by petitioner in his brief are guideposts, but not the only criteria to be used. Cf. U.S. v. Wade, 388 U.S. 218, 241 (1967); U.S. v. O'Connor, 282 F. Supp. 963, 965 (D.D.C., 1968), affd. 137 U.S. App. D.C. 76, 78, 420 F. 2d 644 (1969); U.S. ex rel. Carter v. Mancusi, 342 F. Supp. 356 (S.D.N.Y., 1971), affd. 460 F. 2d 1406 (1972), cert. den. 409 U.S. 1009.

he could observe them for 5-10 seconds. As Judge Foley noted, Rees was unequivocally motivated to retain a definite lasting reliable image as two of the men reminded him of friends [1232-34, 2227]. The petitioner reminded him of a carpenter friend. In court, he was positive that petitioner was the man he saw on April 19.*

Rees stated that "It had nothing to do with the lineup My recollection was of these individuals looking like people I knew." [R-2227]. He further stated that the photographs were not helpful [R-1174-75, 1243, 1249].

Alder was working on a construction site at the corner

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* Ray (petitioner's lawyer) : ... You're just as absolutely positive, with no doubt in your mind, that my client, John Pella, was one of the men that was in front of the Manhattan Barber Shop?

Rees: Yes, sir.
Ray: No doubt in your mind at all, Mr. Rees?
Rees: No.
Ray: Absolutely positive?
Rees: Positive.
[R-1243].

of Cedar and George Street at 8:00 a.m. when he noticed two men pass by him and stop at the corner about 150 feet away [R-459]. He stated they stood there about one minute. He was motivated to make an observation because of the unusual nature of their action. He particularly noticed their dark, wavy hair [R-483].

He also was certain of the identification [R-460].

The time each man observed the men is well-within the factual perimeters recognized by this circuit. U.S. ex rel. Robinson v. Vincent, 506 F. 2d 923 (1974) (two separate viewings, of assailant, one 7-10 seconds long, the second 2-3 seconds); U.S. v. Yanishefsky, 500 F. 2d 1327 (1974) (momentary viewing of side of appellant's face); U.S. ex rel. Birt v. Shubin, 498 F. 2d 1396 (2d Cir., 1974) (Table) brief viewing of fleeing robber by 14 yr. old narcotics addict; U.S. ex rel. Armstrong v. Casscles, 489 F. 2d 20, 23-24 (2d Cir., 1973) (1 minute observation); U.S. ex rel. Cummings v. Zelker, 455 F. 2d 714 (2d Cir., 1972) (15 second observation).

The identifications therefore are separable from the out-of-court procedures. Rees stated that he did not need either the identification in the lineup, or the photographs for his identification.

Nor did the photographs distort Alder's identification. Alder admitted that one photograph aided his identification.

However, the photographs were shown to him close to the time of the robbery, as he wished to be sure and wanted to see side view photographs since his initial view of the robbers was a side view.

If the witness is certain of his identification, and is cross-examined about that identification, it is not necessarily tainted by a prior photographic display. U.S. ex rel. Gonzalez v. Zelker, 477 F. 2d 797 (witness being shown picture of defendant at grand jury and before trial did not taint identification). See also, Simmons v. U.S., 390 U.S. 377, 384 (1968). These identification witnesses withstood rigid cross-examinations before a jury.* As Judge Connor stated, concerning another identification:

> "unrecorded in the official transcript of the trial minutes are other extremely valuable aids. The voice and eyes (how often either or both betray the witness or fail to lend support to his words), the witness' gestures (natural, forced, simulated, etc.) and his general deportment while testifying. Neither of these men were victims and thus subject to the "understandable outrage [which] may excite vengeful or spiteful motives." U.S. v. Wade, 388 U.S. at 230. U.S. ex rel. Robinson v. Vincent, 371 F. Supp. at 418 (S.D.N.Y., 1974).

* Indeed, the jury asked to hear part of Alder's and Rees testimony while deliberating, and weighed it in its determination.

Upon examining the testimony, Judge Foley was correct in stating that the identifications were reliable and constitutionally acceptable. Neil v. Biggers, supra; U.S. ex rel. Kirby v. Sturges, 510 F. 2d 397 (7th Cir., 1975); U.S. ex rel. Crispin v. Mancusi, 448 F. 2d 233, 238 (2d Cir., 1971), cert. den. 404 U.S. 967 (1971); U.S. ex rel. Bates v. Mancusi (supra).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
August 20, 1975

Respectfully submitted,

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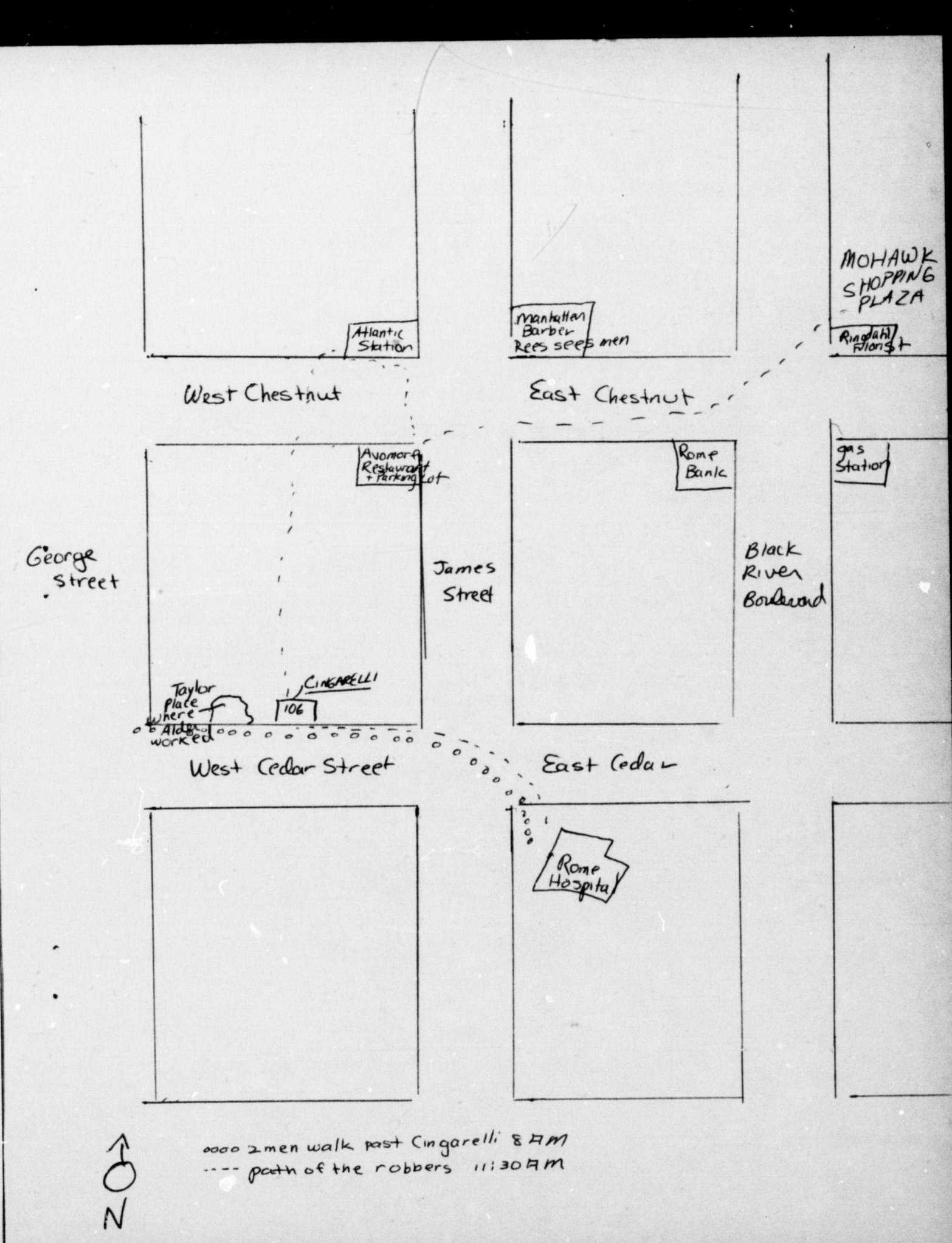
Atlantic Station
Manhattan Barber Rees seeps men
MOHAWK SHOPPING PLAZA
Ringdahl Florist
West Chestnut
East Chestnut
Avomark Restaurant + Parking Lot
Rome Bank
gas Station
George Street
James Street
Black River Boulevard
Taylor Place where Alden worked
CINGARELLI
106
West Cedar Street
East Cedar
Rome Hospital
oooo 2men walk past Cingarelli 8 AM
---- path of the robbers 11:30 AM
N

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CONSTANCE TREZZA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 20th day of August , 1975 , she served the annexed upon the following named person :

EDWARD GERBER, Esq.
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Syracuse, N.Y. 13202

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Constance Trezza

Sworn to before me this
20th day of August , 1975

Barbara Ann Shor
Assistant Attorney General
of the State of New York